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FIFTY-EIGHTH ANNUAL REPORT.

Mount Auburn Cemetery.

JANUARY 1, 1890.

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ANNUAL REPORT  
OF THE  
TRUSTEES  
OF THE  
Cemetery of Mount Auburn,  
FOR 1889,  
TOGETHER WITH  
THE REPORTS  
OF THE  
TREASURER AND SUPERINTENDENT.

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FIFTY-EIGHTH YEAR.

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BOSTON:  
ALFRED MUDGE & SON, PRINTERS,  
No. 24 FRANKLIN STREET.  
1890.

1874

1874

## OFFICERS OF THE CORPORATION FOR 1890.

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### Trustees.

J. MONTGOMERY SEARS	* * * * *	<i>Term expires in</i> 1890.
CHARLES F. CHOATE	. * * * * .	" " 1890.
RICHARD M. HODGES	. * * * * .	" " 1891.
DAVID R. WHITNEY	. * * * * .	" " 1891.
ISRAEL M. SPELMAN	. * * * * .	" " 1892.
JEROME JONES	. * * * * .	" " 1892.
WILLIAM S. EATON	. * * * * .	" " 1893.
ROGER WOLCOTT	. * * * * .	" " 1893.
SAMUEL R. PAYSON	. * * * * .	" " 1894.
T. QUINCY BROWNE	. * * * * .	" " 1894.
HENRY A. RICE	. * * * * .	" " 1895.
CHANNING CLAPP	. * * * * .	" " 1895.

### President.

ISRAEL M. SPELMAN.

### Treasurer.

H. B. MACKINTOSH.

### Secretary.

L. G. FARMER.

### Superintendent.

JAMES W. LOVERING.

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**Office of the Corporation.**

5 TREMONT STREET,  
BOSTON.

**Office of the Superintendent.**

AT THE CEMETERY,  
P. O. ADDRESS, CAMBRIDGE, MASS.

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*Orders for work on lots may be given at the office of the Superintendent,  
or sent by mail to his address.*





## FIFTY-EIGHTH ANNUAL REPORT.

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The fifty-eighth annual report, including the reports of the Superintendent and Treasurer, is herewith submitted.

The condition of the various funds is as follows: —

The Repair fund has gained \$37,547.09 during the year, and amounts to \$600,953.18.

The Permanent fund shows gain of \$8,875.28, and is now \$286,881.86.

The General fund has increased \$7,502.91, and amounts to \$68,380.89.

Among the items of "other property of the corporation" enumerated on page 11 of this report the Coolidge lot appears for the first time. This is a lot of about six acres in the rear of the cemetery in Watertown, running through to Grove street. The Trustees thought best to accept a favorable offer for the purchase of this land. It may be annexed to the cemetery for interment purposes by consent of the town of Watertown, but it was not purchased with that intention. It is now held like other property outside the cemetery limits, and the small necessary expense of maintaining it is for the present more than compensated by the sods and other material for the uses of the corporation thus secured. It may prove in the future, with the growth of the city of Cambridge now constantly pressing upon our lands, a very desirable acquisition.

The Treasurer's account shows an item of eighteen hundred dollars from the city of Cambridge for the widening of Brattle street. This widening took a strip about ten feet in width, in all three thousand and six square feet, from our lots on Brattle street,

occupied by the Superintendent's house and our green-houses, and necessitated the removal of one of the green-houses. The Trustees accepted the above award of the city, deeming it a reasonable compensation for the damages incurred. The green-house removed was an old one, and will be replaced by a larger green-house, now in process of construction, which will be appropriated to tropical plants.

Mention was made in the last report of an assessment for a sewer in Mount Auburn street, levied by the city of Cambridge upon the cemetery, as an abutter on that street. The Trustees deemed the assessment illegal, and took steps to have the question decided by the Supreme Court. A decision of the Court has been rendered in our favor during the past year, confirming the views of the Trustees. As the case is important in its future bearings, it has been thought best to reprint the opinion and action of the Court, which may be found in the appendix.

The amount of new work in grading during the past year has been slight, but as a result of the work of previous years five hundred new lots have been laid out and posted, and are now ready for sale in that part of the cemetery formerly known as the "Watriss lot." Other necessary work has been done to keep the cemetery in good order and remove all those traces of neglect and deterioration, which the lapse of years is constantly bringing about, the more rapidly as the age of the cemetery increases.

For the Trustees,

ISRAEL M. SPELMAN,

*President.*



## SUPERINTENDENT'S REPORT.

*To the Trustees of the Cemetery of Mount Auburn :*

GENTLEMEN, — I have the honor to present herewith the Annual Report of the Superintendent for the year ending Dec. 31, 1889.

### IMPROVEMENTS.

Number of new lots graded and bounded with granite posts . . . . .	52
“ old lots improved by being graded and sodded . . . . .	27
“ old lots bounded with granite posts . . . . .	4
“ lots enclosed with granite . . . . .	0
“ lots enclosed with iron fence . . . . .	0
“ lots furnished with granite or iron numbers . . . . .	75
“ tombs removed . . . . .	1
“ headstones erected . . . . .	339
“ monuments erected . . . . .	41
“ iron fences removed . . . . .	57
“ granite curbing removed . . . . .	0

### INTERMENT RECORD.

Total number of interments, as per last report . . . . .	27,074
Number of original interments for the year ending Dec. 31, 1889 . . . . .	495
“ removals from other cemeteries . . . . .	41
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Total number of interments for the year . . . . .	536
“ “ “ in cemetery . . . . .	27,610
Of the above there were deposited in the receiving tomb . . . . .	29
“ “ “ “ interments in public lots . . . . .	24

### THE REMOVALS WITHIN AND FROM THE CEMETERY WERE AS FOLLOWS :

To public lots . . . . .	4
To private lots . . . . .	40
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Total removals within the cemetery . . . . .	44
“ “ from the cemetery . . . . .	16
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Total number of removals . . . . .	60

Respectfully submitted,

J. W. LOVERING,

*Superintendent of the Cemetery of Mount Auburn.*

MOUNT AUBURN, Dec. 31, 1889.

## TREASURER'S REPORT

## RECEIPTS.

Cash balance from preceding year . . . . .		\$15,779.60
He has received from sundry parties, —		
For sale of lots . . . . .	\$18,702.00	
“ deposits in receiving tomb . . . . .	706.00	
		\$19,408.00
For deeds, transfers, etc. . . . .		233.00
“ labor and material on lots . . . . .		53,242.75
Interest on loan . . . . .		1,684.34
From Massachusetts Hospital Life Insurance Company, for income on Permanent Fund . . . . .		8,000.00
From city of Cambridge, damages for widening Brattle street . . . . .		1,800.00
From Massachusetts Horticultural Society, for one quarter part of expenditures, as follows: —		
Grading Birch to Eagle and Cherry avenues . .	\$205.50	
“ Glen avenue (Watriss lot) . . . . .	428.25	
		158.44
One quarter of . . . . .	\$633.75	
		84,526.53
		<u>\$100,306.13</u>

## FOR THE 58TH YEAR, 1889.

## EXPENDITURES.

He has paid sundry parties, —	
For labor (pay roll) . . . . .	\$36,035.19
“ materials . . . . .	11,946.33
“ repairs of buildings and fences . . . . .	2,201.95
“ account new green-house . . . . .	625.39
	<hr/> \$50,808.86
For expenses, — salaries . . . . .	7,499.88
“ office expenses . . . . .	2,383.25
“ taxes on real estate . . . . .	679.78
“ legal expenses . . . . .	511.00
“ investment . . . . .	10,000.00
To amount paid for Coolidge lot . . . . .	4,613.30
“ amount paid Massachusetts Horticultural Society for its proportion of sales . . . . .	4,480.75
“ amount paid Massachusetts Hospital Life Insurance Company for Permanent Fund . . . . .	5,790.66
“ graves purchased . . . . .	\$55.00
“ new receiving tomb drawback . . . . .	30.00
	<hr/> 85.00
	<hr/> \$86,852.48
Balance in hands of Treasurer . . . . .	13,453.65
	<hr/> \$100,306.13

## ANNUAL REPORT.

## RECEIPTS AND EXPENDITURES OF THE REPAIR FUND.

Balance in hands of Treasurer, as per last report . . . . .	\$15,896.09	
He has received, —		
From notes receivable . . . . .	\$58,500.00	
“ endowments . . . . .	30,572.00	
“ income of investments . . . . .	25,799.92	
		114,871.92
		<u>\$130,768.01</u>
He has paid for said account, —		
For care and improvement of lots . . . . .	\$18,824.83	
“ notes receivable . . . . .	89,000.00	
		\$107,824.83
Balance in hands of Treasurer . . . . .		22,943.18
		<u>\$130,768.01</u>

## REPAIR FUND.

## PROPERTY.

Endowments for perpetual repair of lots, as per last report . . . . .	\$563,406.09	
Additions during the year . . . . .	37,547.09	
		<u>\$600,953.18</u>
Invested as follows:—		
Notes receivable, secured by mortgage . . . . .	\$560,200.00	
\$10,000 Boston City Bonds . . . . .	9,710.00	
30 shares Atlas National Bank, cost . . . . .	2,970.00	
20 shares Atlantic National Bank, cost . . . . .	2,700.00	
20 shares Shawmut National Bank, cost . . . . .	2,430.00	
		\$578,010.00
Cash in hands of Treasurer . . . . .		22,943.18
		<u>\$600,953.18</u>

## GENERAL FUND.

## CASH ASSETS.

Cash in hands of Treasurer . . . . .	\$13,453.65	
Notes receivable . . . . .	48,000.00	
Bills for labor and material uncollected . . . . .	\$8,666.91	
Less due sundry parties for labor and material . . . . .	1,739.67	
		6,927.24
		<u>\$68,380.89</u>

## PERMANENT FUND.

Deposited with Massachusetts Hospital Life Insurance		
Company, as per last report . . . . .		\$278,006.58
Deposited in December, 1889 . . . . .	\$5,790.66	
Interest . . . . .	3,084.62	
		8,875.28
		<u>\$286,881.86</u>

## THE OTHER PROPERTY OF THE CORPORATION

Consists of nearly 136 acres of cemetery grounds, with avenues and paths, water works for the supply of fountains and watering purposes, and underground pipes and drains, chapel and statuary, observatory, receiving tomb, gateway and other structures, reception house, and 5,620 feet of land on Mount Auburn street, Superintendent's house, green-houses, and 61,170 feet between Brattle and Mount Auburn streets, the Coolidge lot on Grove street, containing about six acres, and the Stone meadow on the east side of Coolidge avenue, containing about five acres, on which are located the stables and other buildings.

Respectfully submitted,

H. B. MACKINTOSH, *Treasurer.*

Boston, Jan. 1, 1890.

This certifies that we have examined the books and accounts of the Treasurer of the Proprietors of the Cemetery of Mount Auburn for the year eighteen hundred and eighty-nine, and have found them correctly kept and properly balanced, with satisfactory vouchers for all payments.

The certificates of stock and other evidences of property were found in accordance with the statements of his accounts.

In the general account there appears to be a balance in the hands of the Treasurer of \$13,453.65, and in the fund for repairs, \$22,943.18.

T. QUINCY BROWNE, }  
HENRY A. RICE, } *Committee on Finance.*

JANUARY 11, 1890.



## PERPETUAL REPAIR OF LOTS.

It is provided by Art. VIII. of the By-Laws as follows : —

DONATION IN TRUST. — “The Trustees may receive in trust from a Proprietor any sum of money, the *income* of which shall be appropriated to the repair of his lot, according to the terms of trust expressed in the form provided.”

PERPETUAL REPAIR, WITH GUARANTY. — “The Trustees may also guarantee the *perpetual* repair of lots, upon the payment of such a sum as the Committee on Lots shall deem sufficient for that purpose, a form for which is also provided.

“All such sums shall collectively constitute a separate fund, called the ‘Repair Fund,’ and shall be invested in the public debt of the United States, or in that of the State of Massachusetts, or in the debt of any of the counties, cities, or towns of this State, or in mortgages of real estate in any city in Massachusetts, or in first-mortgage bonds, or debenture bonds of railroads not mortgaged, of any railroad company incorporated under the authority of this Commonwealth, which has earned and paid regular dividends for the two years next preceding such investment.

“Each lot in relation to which such a contract shall have been made shall be credited in a book kept for the purpose, with the principal sum paid on account of said lot; and at the close of each year a ratable proportion of the net income of the whole Repair Fund shall be carried to its credit, in conformity with the terms of said contracts.”

RECONVEYANCE IN TRUST. — “A Proprietor who shall have contracted with the corporation for the care and preservation of his lot forever, desiring to place the same in perpetual trust, for the purpose of restricting the right of burial, or for any other legitimate object, may, with the consent of the Committee on Lots, reconvey such lot

to the corporation, to hold the same forever, for the uses and trusts expressed in his deed of reconveyance; reserving to himself, and to such as may be beneficiaries thereunder, the right of admission, and such supervision as may not be inconsistent with the rights which have vested in the corporation."

Annexed to the GUARANTEE CONTRACT is a report by the Superintendent, with drawings, describing in detail the condition of the lot and structures thereon. The amount deposited is an *insurance FOREVER* that the lot and its belongings shall always be maintained in the condition shown in the report, which is made the basis of the contract.

To cover all the contingencies of the near and remote future, a sum is fixed, the income of which will be sufficient to provide for the care of the grass, including resodding, and the repair and renewal of such tomb, curb, monument, or headstone, as shown in Superintendent's report.

If any monument or headstones are added subsequent to the contract, they can be covered in the same manner.

After a contract for perpetual repair, with *guaranty*, has been made, the lot may be reconveyed to the corporation, *in trust*, naming in the deed the persons thereafter to be interred. The *title* to the lot being thus vested in the corporation, a *perfect security* is given that the wishes of the proprietor will be carried out.

Under the contract for DONATION IN TRUST, the *income* of any sum deposited is applied to the care and preservation of the lot.

The necessary forms for provision by will for the above are given herewith.

J. W. LOVERING,  
*Superintendent.*

## CEMETERY OF MOUNT AUBURN.

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FORM FOR CLAUSE IN WILL TO BEQUEATH MONEY FOR "PERPETUAL  
REPAIR, WITH GUARANTY," OF LOT.

I hereby direct my executors to pay to the Proprietors of the Cemetery of Mount Auburn such sum of money as may be found necessary to obtain from said corporation a contract for the Perpetual Repair, with Guaranty, of my lot, No.                      on the way called  
in said cemetery.

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FORM FOR CLAUSE IN WILL DIRECTING "RECONVEYANCE OF LOT TO  
CORPORATION, IN TRUST."

*[Reconveyance is only accepted after a Contract for Perpetual Repair, with Guaranty, has been made.]*

I hereby authorize and empower my executors to reconvey my Lot, No.                      , in trust, to the Proprietors of the Cemetery of Mount Auburn, in consideration of the Contract of Perpetual Repair, with Guaranty, for the purpose of securing it as a burial-place for myself and the following persons :

and no other interments to be allowed.

## PRICES FOR THE CARE OF LOTS,

ADOPTED BY THE TRUSTEES

FOR 1890.

SIZE OF LOT.	CARE.	TOP-DRESSING.	
100 square feet.	\$1.50	\$1.00	Larger lots at special rates.
200    "    "	2.00	1.50	Lots containing fractional parts of 100 feet will be charged the rate of the next larger size, when that fraction exceeds 50 feet.
300    "    "	3.00	2.00	
400    "    "	4.00	2.50	
500    "    "	5.00	3.00	
600    "    "	6.00	3.50	
700    "    "	7.00	4.00	
800    "    "	8.00	4.50	

Proprietors are requested to mail their orders to Superintendent, Cambridge.

Estimates for grading and sodding, and repairs on lots, including cleaning monuments and headstones, will be furnished to proprietors on application, personally, or by letter, at Superintendent's office, Cambridge. Iron fences and granite copings removed without expense to proprietors, who will be credited with any excess over cost of removal.

Single-chamber tombs, with entrance above ground, will be removed, the lot regraded, and the necessary reinterments made, without charge, except for boxes, brick graves, resodding, or corner posts when required.

Orders for foundations for monuments and headstones should specify, either by diagram or accurate description, the exact location in the lot which is desired, and should be given *at least ten days before wanted.*

## APPENDIX.

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### Commonwealth of Massachusetts.

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SUFFOLK, SS.

PETITION FOR CERTIORARI.

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PROPRIETORS OF THE CEMETERY OF MOUNT AUBURN

v.

MAYOR AND ALDERMEN OF CITY OF CAMBRIDGE ET AL.

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#### OPINION.

W. ALLEN, J.—Pub. Stats. Chap. 50, Sect. 1, authorizes the proper officers of towns and cities to make main drains and common sewers, and Sect. 4 provides that every person who enters his particular drain into such main drain or common sewer, or who by more remote means receives benefit thereby for draining his cellar or land, shall pay to the town or city a proportional part of the charge for making the sewer, to be assessed by the mayor and aldermen. Sect. 7 provides that the city council of a city, or the voters of a town, may adopt a system of sewerage for the whole or a part of its territory, and may provide that assessments under Sect. 4 shall be made upon owners of estates within such territory by a fixed uniform rate based on the estimated average cost of all the sewers therein, according to the frontage of such estates on any street where the sewer is laid, or according to the area of such estate within a fixed depth from such street, or according to both frontage and area. Sect. 8 provides that, instead of the assessment under Sect. 4, it may be determined that every person who uses the sewer shall pay therefor a reasonable sum to be determined by the proper officers.

The mayor and aldermen of Cambridge made a sewer through Mount Auburn Street, on which Mount Auburn Cemetery abuts, and assessed the cost upon the owners of estates on the street, under the seventh section, and included the petitioner in the assessment as owner of the cemetery. The only question is, whether it is liable to be assessed.

Stat. of 1831, Chap. 69, authorized the Massachusetts Horticultural Society to dedicate and appropriate any part of the real estate owned by it as and for a rural cemetery or burying-ground, and for the erection of tombs, cenotaphs, and monuments for and in memory of the dead, and for that purpose to lay out the same in burial lots, and to plant and embellish the same with shrubbery, flowers, trees, walks, and other mural ornaments; and provided, that, "whenever the said society shall so lay out and appropriate any of their real estate for a cemetery or burying-ground as aforesaid, the same shall be deemed a perpetual dedication thereof for the purposes



aforesaid, and the real estate so dedicated shall be forever held by said society in trust for such purposes and for none other." It was authorized to grant rights of burial in the lots into which the land should be divided, "and every right so granted and conveyed shall be held for the purpose aforesaid, and for none other, as real estate, by the proprietor or proprietors thereof, and shall not be subject to attachment or execution." Certain land in Cambridge was dedicated and appropriated as a cemetery under this statute. By Stat. of 1835, Chap. 96, the petitioner was incorporated, and authorized to receive a conveyance of the cemetery from the Massachusetts Horticultural Society, to be held upon the same trusts to and for the same purposes and with the same powers and privileges as set forth in Stat. of 1831, Chap. 69. The land which was conveyed by the Massachusetts Horticultural Society to the petitioner, under this statute, is all laid out in lots, with driveways, walks and appendages necessary to its use as a cemetery, and in a large portion of it burial rights have been sold. By the act of incorporation, the cemetery was exempted from all public taxes, and it was required that lots should be sold as fast as practicable, and that the proceeds of sales retained by the corporation should be devoted to the preservation, improvement, and enlargement of the cemetery and the incidental expenses thereof, and to no other purpose.

The assessment in question is a tax levied under the authority and the restrictions of the constitution. *Dugan v. City of Boston*, 12 Allen. 223; *Harvard College v. City of Boston*, 104 Mass. 482. It is a public tax in the sense that it is levied for a public object; it is a local tax in the sense in which most public taxes are local, — that it is limited to a certain locality, it differs from ordinary public taxes in that it is not levied upon the polls and estates within a municipality or a district in respect of public or common benefits, but upon particular lands in respect of a particular benefit received by them from the execution of a public object. Taxes voted by towns and cities for public ways and common sewers are for public objects, and are in every sense public taxes. When the construction of a particular way or sewer is not only for the public benefit, but is also of special benefit to particular lands, the whole or a part of the tax therefor may be levied upon the lands so specially benefited, and there are general statutes prescribing the occasions and the manner of assessing such taxes. (Pub. Stats. Chaps. 50-51.) In the case of public ways, the assessment on any land is limited to one half of the benefit to it; in the case of sewers, the whole or any part of the cost — except in the city of Boston, where at least one fourth of the expense must be borne by the city — may be assessed proportionally upon the lands benefited, either in proportion to the value of the land or to the quantity of the land.

At the time of the dedication of Mount Auburn Cemetery and of the incorporation of the petitioner, there was no general statute which authorized public officers to construct drains and sewers. Stat. of 1796, Chap. 47, and Rev. Stats. Chap. 27, gave no such authority; and, while the statute provided for the construction of main drains and common sewers by individuals, and provided that "every person who afterwards shall enter his particular drain into the same, or by more remote means shall receive any benefit thereby for the draining of his cellar or land, shall pay to the owners" a proportional part of the expense of making and repairing the same, a drain so made was private property, and the statute could not be construed as authorizing a tax or compulsory assessment upon one who did not voluntarily accept the benefit of it. *City of Boston v. Shaw*, 1 Met. 130; *Downer v. City of Boston*, 7 Cush. 277; *Wright v. City of Boston*, 9 Cush. 223.

Stat. of 1841, Chap. 115, made main drains and common sewers the property of cities and towns, and authorized municipal officers to make and maintain them in their respective towns and cities. Sect. 2 provided that "every person who may hereafter enter his particular drain into any main drains or common sewers, so constructed as aforesaid, for the draining of his cellar or land, or in obedience to the by-laws or ordinances of the town or city, or who by any more remote means shall receive any benefit thereby for draining his cellar or land, shall pay to the town or city a proportional part of the charge of making and repairing of such main drain or common sewer." This statute was to take effect only in towns and cities which accepted it. This provision was re-enacted in Gen. Stats. Chap. 48, Sect. 4,

in the form in which it appears in Pub. Stats. Chap. 50, Sect. 4. The provision requiring the assent of towns and cities was repealed by Stat. of 1869, Chap. 111. The question before us is, not so much whether the Legislature intended by the provision in the chapter exempting from public taxes to exempt from assessments under general laws for betterments and benefits,—for such laws were then unknown,—or whether it was the intention of those laws when subsequently enacted to include the cemetery in lands to be specially taxed under them. Other statutes provided for the drainage of meadows, swamps, or low lands. (Rev. Stats. Chap. 115; Pub. Stats. Chap. 189.) The statutes relating to main drains and common sewers were intended for the improvement of land for purposes of residence or business, and having a value for building purposes. The drainage of houses rather than of land is intended. Neither the subject matter nor the language used indicates an intention that the statute should apply to lands perpetually devoted by the Legislature to the use of a burial-place for the dead, and which cannot be sold or used for profit. The word “estates,” as commonly used, does not include such land. The remote benefit, by reason of which the special tax was authorized to be imposed, must be understood to be a pecuniary benefit resulting from the increased market value of the land, and which cannot be predicated of land which has, and can have, no market value. *Downer v. City of Boston*, 7 Cush. 277; *Wright v. City of Boston*, 9 Cush. 233.

The land in question is perpetually devoted by law to the burial of the dead, and it cannot be sold or appropriated to any other use until the law shall be changed. It is true that a cemetery may be so situated that it may be benefited as a place of burial by drainage. But the question here does not arise from the actual or voluntary use of the sewer that may be provided for under section eight of the statute; the question is, whether the right to use the drain without the actual use can be taxed as a benefit to the land. There can be no benefit from the right without the use, unless in the increased value it gives to the land. In the case of land which may be used as building lots, the right to use the sewer in the future increases the present market value of the land. The proprietors of the cemetery can derive no benefit or advantage from the sewer except from its actual use; and they may be unable or unwilling ever to use it; and it can never be used by them in any way to increase the market value of the land. The use to which the land is irrevocably devoted renders it incapable of receiving the benefit intended by the statute. It is not necessary to decide what is affirmed by the petitioner, that the land is devoted to a public use. The question we are considering is not whether a public cemetery, which may be liable to be sold by a town, as the land upon which a court-house stands can be sold by a county, would be exempt from this assessment under the decision in *Worcester County v. Worcester*, 116 Mass. 193; nor whether the land of a private cemetery, which may have been taken by the right of eminent domain, which is exempt from taxation, and across which a public way cannot be laid, or which cannot be taken for a public use without special authority of the Legislature (see Pub. Stats. Chap. 11, Sect. 5, cl. 8; Chap. 82, Sects. 16, 29), but which the legal and beneficial owners are at liberty to appropriate to general purposes, or to sell for such purposes, is exempt by the statute from taxes of this kind; but whether, when the Legislature had appropriated certain land for a burying-ground and forbidden that it should ever be sold or used for any other purpose, and had forbidden that moneys received from it should be devoted to any purpose except its preservation and improvement as a burying-ground, they intended that it should be taxed for the right to use a sewer laid out under Stat. of 1841, Chap. 115, and subsequent acts. As bearing upon this, the provisions of Pub. Stats. Chap. 50, Sect. 7, first enacted in Stat. of 1878, Chap. 232, Sect. 3, and Stat. of 1879, Chap. 55, are to be considered. Under these provisions, all the land assessed in the designated territory is to be assessed ratably in proportion to quantity, not to value. The tax must be proportional, and it is the intention of the statute to make it so. Under Sect. 4, the proportional benefit and tax was determined by the value of the land. The amendment embodied in Sect. 7 apportioned the tax to the quantity of land, and was obviously applicable to land available as city or village lots, and for kindred purposes. It could not have been intended to enact that land



which could be used only for purposes of burial of the dead should be deemed to be equally benefited by a street sewer as the same area of land in building lots on the same or any other street in the designated territory. Whether the use is regarded as public or not, the fact that the land is perpetually devoted to the purposes of burial, and cannot be sold or appropriated to other uses, distinguishes this case from *Deansville Cemetery Association, petitioner*, 66 N. Y. 596, and *Donnelly v. Boston Roman Catholic Cemetery Association*, 146 Mass. 163, and brings it within the reasons of the decision in *Evergreen Cemetery Association v. Bucher*, 53 Conn. 531, and *Evergreen Cemetery Association v. New Haven*, 43 Conn. 234.

The statute provides that assessments shall constitute a lien upon the real estate assessed, and may be levied by sale of such real estate. It is clear that the land of the petitioner was not "real estate assessed" within the meaning of this provision. The Legislature could not have intended to authorize a sale of the cemetery under this provision. It was perpetually appropriated by express legislative authority to the purposes of a burial-ground; it was made exempt from taxation; it was to be divided into burial lots, the rights of which were to be sold as soon as practicable, and which were exempt from taxation and from execution (Pub. Stats. Chap. 3, Sect. 5; Chap. 97, Sect. 22), and were protected from desecration or injury by penal statutes. (Rev. Stats. Chap. 130, Sects. 19, 21.) The land assessed has all been laid out, and a large portion of it has been sold in fee simple to different persons for the purposes of burial, and bodies have been interred therein. Whether the deeds conveyed the title or only a beneficial interest in the land is immaterial. If the Legislature intended that the legal title should remain in the corporation, it did not intend that the graves of the dead should be sold to pay for drains and sewers for houses of the living. See *Commonwealth v. Viall*, 2 Allen, 512; *Sollier v. Trinity Church*, 109 Mass. 1; *Lainville v. Nevin*, 10 Bush. 549; *Lima v. Cemetery Association*, 42 Ohio St. 128; *Oakland Cemetery v. St. Paul*, 32 N. W. Rep. 781; *Buffalo Cemetery v. Buffalo*, 46 N. Y. 506; *Mayor of Baltimore v. Green Mount Cemetery*, 7 Md. 517; *Brown v. Lutheran Church*, 23 Pa. St. 495; *Olive Cemetery Co. v. City of Philadelphia*, 93 Pa. St. 129. There is no other way in which the tax can be collected, and as the provision made for collecting the tax does not apply to an assessment upon this land, the inference is strong it was not intended that the land should be assessed. *Roxbury v. Nickerson*, 114 Mass. 544; *Worcester County v. Worcester*, *ubi supra*. It was decided in *Worcester Agricultural Society v. Worcester*, 116 Mass. 189, that the provision of the Gen. Stats. Chap. 11, Sect. 5, Clause 5 (Pub. Stats. Chap. 11, Sect. 5, Clause 9), exempting the estate of incorporated agricultural societies from taxation, does not include sewer assessments; and the same decision as to a highway assessment was made in *Seamen's Friend Society v. Mayor and Aldermen of Boston*, 116 Mass. 181, in respect to the exemption in the same statute of property of charitable institutions. Those exemptions are in the general tax law, which provides for the assessment and collection of taxes, and are held to apply to taxes to be assessed and collected under that law, and not to assessments for highways and sewers, which, though public taxes, are not assessed or collected under the general tax law, but under particular statutes. There is an implied limitation of the restriction to the taxes which are the subject matter of the chapter which does not exist in regard to the exemptions in the charter of the petitioners. A more marked distinction is, that real estate held by such societies receives the same benefit from roads and sewers as if owned absolutely by an individual. It has a market value; it may be appropriated to any lawful use, and may be sold for such use; and it may be sold to pay the assessment. Even if the words "all public taxes" in the act of incorporation are not held to include the special tax for sewers that was subsequently created, the provision at least shows a legislative disposition to be considered in finding its intention in the subsequent acts. We think it was not the intention of those acts that the petitioner's land should be assessed under them.

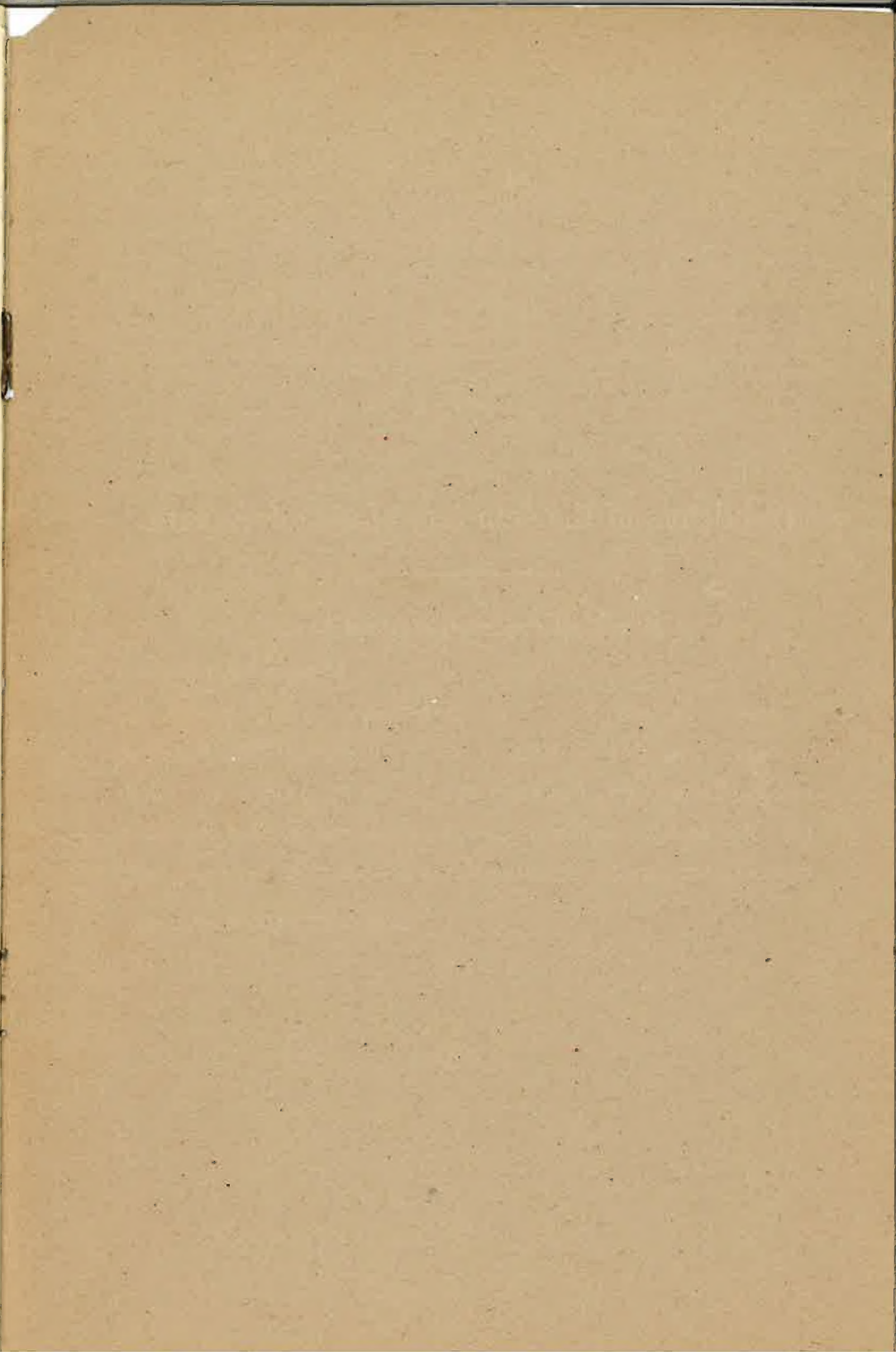
In accordance with this opinion, the demurrer filed by the defendants to the petition was overruled and the following decree entered:—

## FINAL DECREE.

The above-entitled cause having come on to be heard, and having been argued by counsel, and it appearing that the assessment laid by the said mayor and aldermen upon the lands of the petitioner as set forth in said petition was not authorized by law, it is ordered, adjudged, and decreed that said mayor and aldermen certify the record of their proceedings in the premises to this Court, in order that the same may be quashed, and that the said Wm. W. Dallinger be and he is hereby perpetually enjoined from selling said lands to collect said assessment. And it is further ordered that the defendants pay to the petitioner its costs of this petition.

G. & W. L. PUTNAM, *for the Petitioner.*

C. J. McINTIRE, *for the Defendants.*





## Proprietors of the Cemetery of Mount Auburn.

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Office of the Corporation, 5 Tremont Street.

BOSTON, Jan. 20, 1890.

The Annual Meeting of the Proprietors of the Cemetery of Mount Auburn will be held at the Horticultural Hall, Tremont Street, Boston, on Monday, Feb. 3, at 3½ o'clock P. M., to hear the Annual Reports, choose Trustees, and transact any other business that may legally come before the meeting.

L. G. FARMER, Secretary.